SUPREME COURT, U. S.
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Supreme Court of the United States

No. 74-226

October Term, 1974

MICHAEL KENSINGER,
Appellant,

vs.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

Jurisdictional Statement 1
Opinions Below 2
Jurisdiction 2
Statutes Involved 3
Questions Presented 3
Statement of the Case 4
The Questions Are Substantial 7
I. Ohio Revised Code Sections 2905.34 and 2905.35 Are Unconstitutional 7
A. The Statute Is Void for Overbreadth 9
B. The Statute Is Void for Vagueness 12
II. Arrest for Distribution of Materials to Which First Amendment Protection Is Claimed Is Unconstitutional in Absence of Prior Judicial Determination of Obscenity of Material 13
III. Officer's "Purchase" of Materials Is a Seizure and Absent a Prior Judicial Determination of Their Obscenity Compels Their Suppression As Evidence 14
IV. The Materials Are Constitutionally Protected Expression 15
V. Appellant Was Unlawfully Convicted Without Proof of Guilty Knowledge and Guilty Purpose .. 16
VI. The Trial Court Erroneously Charged the Jury in Defining the Elements of the Crime 17
VII. The One-on-One Pre-Trial Identification of Appellant Violated Due Process of Law 17
Conclusion 18

APPENDICES:

A. Orders of the Supreme Court of Ohio:

On Appeal As of Right 21
On Motion for Leave to Appeal 22
On Rehearing 22
On Motion to Stay of Execution 22

B. Opinion of the Court of Appeals for Hamilton County, Ohio 23

Opinion of Court of Appeals in Companion Case 35

C. Notice of Appeal to the Supreme Court of the United States 53
D. Relevant Sections of the Ohio Revised Code 54

TABLE OF AUTHORITIES

Cases

Art Theater Guild, Inc. v. State, ... Tenn. ....., 14 Cr.L. 2498 (2-19-74) 19
Austin v. Kentucky, 386 U.S. 767 (1967) 10
Butler v. Michigan, 352 U.S. 380 (1957) 17
Chobot v. Circuit Court, ... Wis. ....., 14 Cr.L. 2323 (1973) 19
City News Center, Inc. v. Carson, 310 F. Supp. 1018 (M.D. Fla. 1969) 14, 15
Commonwealth v. Horton, ... Mass. ....., 15 Cr.L. 2184 (4-23-74) 19
Costello v. United States, 350 U.S. 359 (1956) 14
Delta Books Distributors v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969), *vacated other grounds,* 401 U.S. 82 (1971) 14, 15

Dombrowski v. Pfister, 380 U.S. 479 (1965) 9
Flournoy v. Weiner, 321 U.S. 253 (1944) 2
Gibbs v. State, ... Ark. ....., 14 Cr.L. 2450 (1974) 19
Gooding v. Wilson, 405 U.S. 518 (1972) 9
Goodwin v. Morris, 318 F. Supp. 1325 (N.D. Ohio 1970) 14
Grove Press, Inc. v. Flask, 326 F. Supp. 574 (N.D. Ohio 1970), *vacated and remanded on other grounds*, 413 U.S. 902 (1973) 12
Hanling v. United States, ... U.S. ....., 94 S. Ct. 2887 (1974) 12
Jenkins v. Georgia, ... U.S. ....., 94 S. Ct. 2750 (1974) 10, 16, 18
Johnson v. United States, 333 U.S. 10 (1948) 14
Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) 12
Kirby v. Illinois, 406 U.S. 682 (1972) 17
Miller v. California, 413 U.S. 15 (1973) 10, 11, 12, 13, 15, 16, 17, 18
N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964) 9
N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 9
Neil v. Biggers, 409 U.S. 188 (1972) 17
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 12
Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922) 2
Rave v. Washington, 405 U.S. 313 (1972) 13
Rhodes v. State, ... Fla. ....., 283 So. 2d 351, 14 Cr.L. 2081 (1973) 19
Roaden v. Kentucky, 413 U.S. 496 (1973) 13, 14, 15
Roth v. United States, 354 U.S. 476 (1957) 16, 17, 18
Shelton v. Tucker, 364 U.S. 479 (1960) 9
Sheperd v. New York, 388 U.S. 444 (1967) 10
Smith v. California, 361 U.S. 147 (1959) 16
Smith v. Coiner, 473 F.2d 877 (4th Cir. 1973), *cert. den.*, 94 S. Ct. 848 17

State ex rel. Keating v. "Vixen", 27 Ohio St. 2d 278 (1971), *reversed and remanded* 413 U.S. 905 (1973), *on remand* 35 Ohio St. 2d 215 (1973) 10, 11, 15, 19
State ex rel. Sensenbrenner v. Adult Book Store, 35 Ohio St. 2d 220 (1973), *petition for cert. filed*, 43 U.S.L.W. 3037 (1973) 18
State v. Blair, 32 Ohio St. 2d 237 (1972) 15
State v. Blair, 35 Ohio St. 2d 223 (1973) 15
State v. J-R Distributors, Inc., 14 Cr.L. 2006 (1973) 19
State v. Shreveport News Agency, Inc., ... La. ....., 287 So. 2d 464, 14 Cr.L. 2273 (1973) 12, 19
State v. Welke, ... Minn. ....., 14 Cr.L. 2498 (1974) 19
Stroud v. State, ... Ind., ..., 300 N.E.2d 100, 13 Cr.L. 2541 (1973) 19
United States ex rel. Robinson v. Zelker, 368 F.2d 159 (2nd Cir. 1972), *cert. den.*, 413 U.S. 939 17
United States v. Raines, 362 U.S. 17 (1960) 9
United States v. Wade, 388 U.S. 218 (1967) 18

Constitution

United States Constitution:

First Amendment 3, 6, 9, 13, 14, 17, 18
Fourth Amendment 13, 15
Fourteenth Amendment 9, 18

Statutes

Ohio Revised Code:

Former Sec. 2905.34 .....1, 2, 3, 4, 6, 7, 8, 9, 10, 18
Former Sec. 2905.35 .....1, 2, 3, 4, 6, 7, 18
Current Sec. 2907.01 .....3, 7, 8, 9, 12, 13
Current Sec. 2907.32 ..... 3, 7
Current Sec. 2907.35 3

Supreme Court of the United States

No. .....

October Term, 1974

MICHAEL KENSINGER,
Appellant,

vs.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellant, Michael Kensinger, appeals from the orders of the Supreme Court of Ohio entered May 10, 1974, reconsideration denied June 6, 1974, which dismissed his appeal from the Court of Appeals for Hamilton County, Ohio (First Appellate District) for the reason that no substantial constitutional question was presented. The Court of Appeals for Hamilton County upheld the constitutionality of Ohio Revised Code Sections 2905.34 and 2905.35. The Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial constitutional question is presented.

OPINIONS BELOW

The orders of the Supreme Court of Ohio are attached as Appendix "A". The opinion of the Court of Appeals is unreported but reproduced and attached as Appendix "B", together with its opinion in the companion case of *State of Ohio v. Queen City News, Inc., et al.*, which opinion is referred to by the Court of Appeals in *Kensinger*.

JURISDICTION

Appellant was found guilty on October 21, 1972 in the Court of Common Pleas of Hamilton County of two (2) counts, of possession of obscene materials with intent to distribute the materials in violation of Ohio Revised Code Sections 2905.34 and 2905.35. The Court of Appeals of Hamilton County entered its judgment affirming the convictions on January 14, 1974. On May 10, 1974 the Supreme Court of Ohio dismissed the appeal taken by the appellant to that court and denied his motion for reconsideration on June 6, 1974. Appellant filed his Notice of Appeal to this Court in the Court of Appeals of Hamilton County, the court possessed of the record, on August 23, 1974. A copy of Notice of Appeal is attached as Appendix "C".

The jurisdiction of this Court to review the decisions by appeal is based on Title 28 U.S. Code, Section 1257(2) in that this case draws in question the validity of statutes of the State of Ohio on the grounds of their being repugnant to the Constitution of the United States, and the decision below was in favor of their validity. Further, appellant properly invokes the jurisdiction of this Court to review other denials of his constitutional rights as if on writ of *certiorari*. *See Flournoy v. Weiner*, 321 U.S. 253, 263 (1944); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922).

STATUTES INVOLVED

The statutory provisions under which appellant was convicted, Sections 2905.34 and 2905.35, were repealed, and newly enacted Sections 2907.01 and 2907.32, became effective January 1, 1974. However, the statutory language of the former sections that formed the basis for appellant's challenges to the constitutional validity of said sections was incorporated virtually unchanged in the new enactments. Thus, appellant's challenges to the constitutional validity of Sections 2905.34 and 2905.35 are applicable and relevant to, and have not been mooted by, the newly enacted statutory provisions. Copies of former Sections 2905.34 and 2905.35 and current Sections 2907.01 and 2907.32 are attached as Appendix "D".

QUESTIONS PRESENTED

1. Whether Ohio Revised Code Sections 2905.34 and 2905.35, the statutes under which appellant was charged, tried and convicted, are void for overbreadth or vagueness.

2. Whether the arrest for distribution of materials to which First Amendment protection is claimed is unconstitutional in absence of a prior judicial determination of the obscenity of such materials.

3. Whether materials "purchased" by a police officer without a prior judicial determination of their obscenity is an illegal seizure.

4. Whether the materials forming the basis for each of the two (2) counts upon which the appellant's convictions rest are constitutionally protected expression.

5. Whether the prosecution failed to prove the essential elements of its case in failing to establish that the appellant possessed guilty knowledge and guilty purpose.

6. Whether the trial court erroneously charged the jury in defining the elements of the crime charged by defining "average person" in the community to include, *inter alia*, the "young" and "children".

7. Whether the one-on-one, pre-trial identification of appellant, conducted after appellant was indicted but in the absence of counsel, and conducted without a line-up notwithstanding the absence of any law enforcement emergency, violated due process of law.

STATEMENT OF THE CASE

On October 21, 1972, defendant-appellant, Michael Kensinger was convicted by a jury in the Hamilton County Court of Common Pleas, of violating Ohio Revised Code Section 2905.35 which prohibits, *inter alia*, the possession of obscene materials, as defined in Ohio Revised Code Section 2905.34, with intent to sell or distribute them.

On January 19, 1972, James Simon, an undercover agent of the Cincinnati Police Department, acting pursuant to specific instructions received from his superior, entered the book store located at 134 West 7th Street, Hamilton County (R. 292-294, 297),[1] and purchased books that Simon in his sole discretion, considered to be obscene (R. 294, 307, 308, 309, 313, 354).

After entering the store, Simon became engaged in conversation with an unidentified man sitting behind a cash register positioned upon a platform (R. 295, 315, 333, 346). Soon thereafter, the man indicated that if Simon was "looking for something good", Simon should read two

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1. "R. ....." refers to pages of the state trial Court proceedings.

books the man was removing from an enclosed cabinet (R. 295, 315, 347).

After reading some captions and scanning the two books (R. 295-296, 306, 361, 367, 371, 378, 380, 390, 391), entitled respectively, *Perversions,* and *Obscene: A New Definition for the Now Generation,* Simon determined the dominant theme concerned sexual perversion (R. 367), and purchased the two books (R. 296, 349, 350). No arrest then occurred (R. 307).

Later the same day the grand jury returned two "John Doe" indictments (R. 308, 309, 312); the indictments named the two books at issue in the instant prosecution (R. 714, 715). A few days later, Officers Simon and Mulligan returned to the book store (R. 304, 306, 307, 312, 451). Upon entering, Simon saw the appellant, who was at the time the only person behind the store counter (R. 330), and identified the appellant as the person who had previously sold him the books (R. 439, 448). Simon identified the appellant in the absence of a lineup (R. 329), *Miranda* warnings (R. 343), or law enforcement emergency, and in the absence of appellant's counsel or waiver of counsel.

At trial, agent Simon related the circumstances surrounding the purchase of the two books, and over defense objection (R. 334-336), to his subsequent pre-trial, out-of-court identification of the appellant. Simon also, over defense objection, made an in-court identification of the appellant.

At the close of the prosecution's case, defense counsel moved to dismiss the charges for failure of proof. The trial court denied counsel's motion (R. 460, 475, 547, 549).

The defense presented the testimony of an expert witness to establish that the materials at issue were not ob-

scene (R. 571, 587, 558, 582, 585, 565, 591, 600, 594, 603, 599).

At the close of appellant's case, counsel renewed his prior motions for dismissal of the charges (R. 665) on grounds including the constitutional infirmity of the statutes involved (R. 665), and the illegality of the arrest and of the seizure of the books in the absence of a prior determination of their obscenity (R. 461). Counsel further moved for dismissal on the grounds that each of the two books are protected as a matter of law (R. 457, 670); and that the state had failed to prove its case (R. 666, 668, 671).

The court then charged the jury (R. 713). The court, *inter alia*, read to the jury segments of Ohio Revised Code Sections 2905.35 and 2905.34 (R. 718-719). In its charge, the court included children in its definition of the average man in the contemporary community (R. 723). Defense counsel took exception to the court's instructions (R. 656-657, 652, 734).

The jury returned a verdict of guilty on both counts (R. 746-747). The court sentenced the appellant to two years probation, and a fine of $250 in each case plus court costs (R. 753).

In its assignments of error to the Court of Appeals, appellant urged the unconstitutionality of Ohio Revised Code Sections 2905.34 and 2905.35, that the publications were constitutionally-protected expression, that the trial court erred in its charge to the jury on the elements of obscenity and the issue of *scienter*, that an arrest for the distribution, or a seizure, even if by "purchase", of materials to which First Amendment protection is claimed requires a prior judicial determination of their obscenity. The Court

of Appeals, Hamilton County, Ohio, affirmed the convictions.

In support of his seeking leave to appeal to the Supreme Court of Ohio, appellant filed his memorandum in support of jurisdiction. Appellant therein presented, *inter alia*, the issues raised in the appellate court and further argued, as he had done in the trial court, that the one-on-one, pre-trial, out-of-court identification of appellant violated due process of law. On May 10, 1974 the Supreme Court of Ohio denied appellant leave to appeal on the ground that no substantial constitutional question was presented. Appellant filed his motion for reconsideration on May 17 and on June 6, 1974, the Court affirmed its decision.

THE QUESTIONS ARE SUBSTANTIAL

I. OHIO REVISED CODE SECTIONS 2905.34 AND 2905.35 ARE UNCONSTITUTIONAL

Ohio Revised Code Section 2905.35 (compare successor Section 2907.32) upon which the convictions of appellant rest prohibits, *inter alia*, the sale of obscene materials, and relies upon Section 2905.34 for definitions of statutory terms, including its statutory definition of obscene material. It is therefore readily apparent that if the definition section is subject to successful constitutional attack, the entire statutory scheme, including the statutory authority for the proceedings below, must fall.

Nor is the substantial nature of the instant challenge to Ohio's "obscenity" laws lessened because of the Ohio legislature's "revision" of such laws subsequent to appellant's trial. (See Sections 2907.32 and 2907.01.) For, although the Ohio laws have been amended subsequent to

appellant's trial, and respective provisions renumbered, the context of the law forming the bases of the within appeal remains virtually unchanged.

Section 2905.34 defines as obscene, material to which "When considered as a whole and judged with reference to ordinary adults, any of [four enumerated criteria] apply." (Compare Section 2907.01(F), which sets forth five enumerated criteria.) Listing these criteria, the statute notes that the material is obscene if "*its dominant appeal is to prurient interest,*" *id.*, Section (A)(1) (see Section 2907.01 (F)(1)), *its dominant tendency is to arouse lust* either by "depicting nudity, sexual excitement or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite," *id.*, Section (A)(2) (see Section 2907.01 (F)(2)), or by "depicting bestiality or extreme or bizarre violence, cruelty or brutality", *id.*, Section (A)(3) (see Section 2907.01(F)(3)), or where the "cumulative effect" of a series of displays of any of the foregoing is "*a dominant tendency to appeal to prurient interest,* when the appeal to such interest is primarily for its own sake or for commercial exploitation. . .," *id.*, Section (A)(4) (compare Section 2907.01(F)(5)).[2]

The statute defines "nudity" as the representation of "human male or female genitals, pubic area or buttocks" or a female breast "below the top of the nipple" with less than a full opaque covering, or "covered male genitals in a discernibly turgid state." *Id.*, Section (B) (see Section 2907.01(H)). It defines "sexual conduct" as "masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact

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2. Section 2907.01(F)(4) sets forth as a fifth alternative criteria, the depiction of "human bodily functions of elimination" if the dominant tendency of the material "is to appeal to scatological interests".

with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast." *Id.*, Section (D). (Compare Section 2907.01(C) defining sexual activity to mean "sexual conduct" or "sexual contact" or both; and Section 2907.01(B) defining sexual contact to mean "any touching of an erogenous zone of another", including, *inter alia*, "the thigh" and "buttock".)

Thus, by its express language, the statute reaches and prohibits portrayal of the "nudity" of a fully clothed male and the "sexual conduct" of physical contact with the fully clothed female breast or buttock in any publication, picture or film, provided the requisite dominant prurient appeal is shown.

Appellant contends that Section 2905.34 is, on its face, constitutionally infirm for (A) overbreadth and (B) vagueness, in violation of the First and Fourteenth Amendments to the United States Constitution, and that the convictions below based upon the definitions contained in that section are, for that reason, vulnerable to constitutional attack as well.

A. The Statute Is Void for Overbreadth.

Governmental legislative regulation of activity affecting First Amendment rights may not be accomplished "by means which sweep unnecessarily broadly." *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307 (1964). *Cf. N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Nor need one who attacks legislation for overbreadth demonstrate that his own conduct could not have been regulated by a law drawn with appropriately narrow specificity. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433 (1963); *Gooding v. Wilson*, 405 U.S. 518, 520-522 (1972).

Section 2905.34(A) prohibits *nudity* and/or sexual conduct if its dominant appeal is to prurient interest or its dominant tendency is to arouse lust. However, the Supreme Court has recently affirmed that publications containing nothing but nudes, whose dominant appeal is unmistakably prurient and lustful, are constitutionally protected. *Jenkins v. Georgia,* ..... U.S. ....., 94 S. Ct. 2750, 2755 (1974). *Cf. Austin v. Kentucky,* 386 U.S. 767 (1967); *Sheperd v. New York,* 388 U.S. 444 (1967).

Moreover, the statutory definition sweeps far more broadly than permitted. Ohio Revised Code Section 2905.34 contains no reference to the constitutional requirement that the material be patently offensive before it may be prohibited. *Jenkins v. Georgia,* ..... U.S. ....., 94 S. Ct. 2750, 2755 (1974). The statute contains an inaccurate reference to the requirement that the material, *taken as a whole,* appeal to a prurient interest, and contains an inaccurate reference to the requirement that the material lack the requisite value (the only reference to a lack of "value" appears in only *one* of the four alternative criteria upon which a conviction may rest, and the reference fails to exclude from the materials defined as obscene, works of serious literary or political value. *Miller v. California,* 413 U.S. 15 (1973)).

Consistent with the admonition in *Miller v. California,* 413 U.S. 15 (1973), that "State statutes designed to regulate obscenity must be carefully limited", the statutes here involved must be struck down as constitutionally infirm for overbreadth.

The Ohio Supreme Court's decision in *State ex rel. Keating v. "Vixen",* 27 Ohio St. 2d 278 (1971) demonstrates and underscores the constitutional invalidity of Ohio's obscenity laws. For in *"Vixen"* the Ohio Supreme Court construed Ohio's "obscenity" statutes to prohibit the pre-

sentation of a motion picture which contains a "series of displays . . . of . . . sexual intercourse . . . the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is . . . for commercial exploitation. . ." *Id.* at 284-285. Ohio's obscenity laws as construed in *"Vixen"* fail to require that the material be patently offensive; fail to require proof that the materials lack the requisite value; and contain an inaccurate reference to the requirement that the material *taken as a whole,* appeal to a prurient interest. Thus, as so construed, Ohio's obscenity laws suffer more constitutional infirmities than if the statutes alone are reviewed in the absence of the *"Vixen"* decision.

The defendants in *"Vixen"* sought review of their convictions by this Court, and this Court vacated the decision of the Ohio Supreme Court and remanded the matter to the state court for reconsideration in light of this Court's holdings in *Miller v. California,* 413 U.S. 15 (1973) and companion cases. *State ex rel. Keating v. "Vixen",* 413 U.S. 905 (1973). Upon such reconsideration, the Ohio Supreme Court quoted from its initial *"Vixen"* decision, and then concluded, without stating its reasons, that Ohio's obscenity law, as construed by the Ohio Supreme Court initially in *"Vixen",* meets with the standards for determining obscenity enunciated in *Miller. State ex rel. Keating v. "Vixen",* 35 Ohio St. 2d 215, 219 (1973). The state court's conclusion was erroneous.

Quite apart from the constitutional invalidity of Ohio's obscenity law even as construed by the Ohio Supreme Court, appellant denies the validity of the attempt by the Ohio Supreme Court to construe the instant law. For, although a court may supply a definition of obscenity where the statute is silent as to its meaning, a court may not undertake to supplant a definition of obscenity where the stat-

ute undertook to define obscenity in very specific and detailed terms. See, e.g., *Grove Press, Inc. v. Flask,* 326 F.Supp. 574 (N.D. Ohio 1970), *vacated and remanded on other grounds,* 413 U.S. 902 (1973). *Cf. State v. Shreveport News Agency, Inc.,* ..... La. ....., 14 Cr.L. 2273, 2274 (S. Ct. La. 12-3-73). Nor does this Court's decision in *Hamling v. United States,* ..... U.S. ....., 94 S. Ct. 2887 (1974) compel a contrary result. For, the judicial construction sanctioned in *Hamling* was with reference to an enactment which defined the prohibited conduct in only *generic terms*: "obscene, lewd, lascivious, or filthy [publications]". *Id.* at 2905, 2906.

The ability of the Ohio Supreme Court to construe a definitive statute, and, even assuming such ability, the validity of the determination that as construed the Ohio obscenity law comports with *Miller,* are unsettled questions arising under the Constitution compelling this Court's review.

B. The Statute Is Void for Vagueness.

Quite apart from the broad sweep of the statutes, appellants contend that its language is so imprecise, "so vague, the language so loose, as to leave to those who have to apply it too wide discretion", *Kingsley Int'l Pictures Corp. v. Regents,* 360 U.S. 684, 694 (1959). A statute that fails to give fair notice of what conduct is forbidden or that encourages arbitrary and erratic arrests is void for vagueness. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972).

The instant statute is replete with ambiguities and moral judgments which compound the vice of vagueness. E.g., "tendency to arouse lust", Sections (A)(2) and (A)(3) (see Section 2907.01(F)(2) and (F)(3)) "in a way which tends to represent human beings as mere objects of

sexual appetite", Section (A)(2) (see Section 2907.01(F)(2)), "extreme or bizarre violence, cruelty or brutality", Sections (A)(3) and (A)(4) (see Section 2907.01(F)(3) and (F)(5)), appeal to prurient interest "for its own sake" for "commercial exploitation" rather than for a "genuine . . . moral . . . purpose", Section (A)(4) (see Section 2907.01(F)(5)).

Acknowledging "the inherent dangers of undertaking to regulate any form of expression", the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), warned that "state statutes designed to regulate obscene materials must be carefully limited." Works which depict or describe sexual conduct may be prohibited only if that conduct is *"specifically defined"* by the applicable state law, as written or authoritatively construed. (Emphasis supplied.) *Cf. Rabe v. Washington*, 405 U.S. 313 (1972).

II. ARREST FOR DISTRIBUTION OF MATERIALS TO WHICH FIRST AMENDMENT PROTECTION IS CLAIMED IS UNCONSTITUTIONAL IN ABSENCE OF PRIOR JUDICIAL DETERMINATION OF OBSCENITY OF MATERIAL

The Fourth Amendment protects people against unreasonable seizures of their persons as well as of their papers and effects. But a halt to the orderly distribution of materials as to which First Amendment protection is claimed is permissible only if preceded by a *judicial* determination of the obscenity of the material. *Roaden v. Kentucky*, 413 U.S. 496 (1973).

Though *Roaden* involved the seizure of a film, the Fourth Amendment prohibitions with respect to the right of expression are equally applicable to the seizure of a person. For fear of arrest, detention and imprisonment

for distributing allegedly obscene material is as much a prior restraint upon the dissemination of ideas as is a seizure of the material itself. *See City News Center Inc. v. Carson,* 310 F. Supp. 1018 (M.D. Fla. 1969) (facts reported at 298 F. Supp. 706); *Goodwin v. Morris,* 318 F. Supp. 1325 (N.D. Ohio 1970); *Delta Books Distributors v. Cronvich,* 304 F. Supp. 662 (E.D. La. 1969), *vacated other grounds* 401 U.S. 82 (1971).

In the instant case, a police officer purchased two books and submitted them to the grand jury, which returned an indictment against the seller of the books. Thereafter the appellant was arrested without any prior scrutiny of the books by a judge. Inasmuch as a judicial determination of obscenity is required, appellant contends that a determination of obscenity by one not a judge, whether it be a policeman engaged in ferreting out crime, *see Johnson v. United States,* 333 U.S. 10, 14 (1948), or a grand juror who, like a prosecutor, is engaged primarily in the investigating and bringing of criminal charges and is not held to observe the rules of law designed to ensure a fair verdict on the merits, *see Costello v. United States,* 350 U.S. 359 (1956), is constitutionally infirm. *See Roaden v. Kentucky, supra.*

III. OFFICER'S "PURCHASE" OF MATERIALS IS A SEIZURE AND ABSENT A PRIOR JUDICIAL DETERMINATION OF THEIR OBSCENITY COMPELS THEIR SUPPRESSION AS EVIDENCE

Seizure by a police officer of materials to which First Amendment protection may be claimed, without a prior determination by a judicial officer on the question of obscenity, and without the authority of a constitutionally

sufficient warrant, is unreasonable under Fourth Amendment standards. *Roaden v. Kentucky*, 413 U.S. 496 (1973).

In the instant case, an undercover agent acted pursuant to the specific instructions of his superior in "purchasing" the two books named in the indictment. The agent's actions were in furtherance of a planned governmental investigation to support criminal prosecutions. The use of governmental dollars rather than a policeman's badge does not make the taking any less of a seizure. Fourth Amendment guarantees against unreasonable seizures cannot be bottomed upon the extent of governmental coffers. Thus, the Ohio Supreme Court in *State v. Blair*, 35 Ohio St. 2d 223 (1973), upon determining that a suppression of materials as evidence was compelled, citing *Roaden v. Kentucky, supra*, reversed convictions grounded upon materials that had been *purchased* as well as these that been otherwise seized. See *State v. Blair*, 32 Ohio St. 2d 237, 244 (1972). *Cf. City News Center, Inc. v. Carson*, 310 F. Supp. 1018 (M.D. Fla. 1970); *Delta Books Distributors v. Cronvich*, 304 F. Supp. 662 (E.D. La. 1969), *vacated other grounds*, 401 U.S. 82 (1971).

IV. THE MATERIALS ARE CONSTITUTIONALLY PROTECTED EXPRESSION

In *State ex rel. Keating v. "Vixen"*, 27 Ohio St. 2d 278 (1971), *reversed and remanded* 413 U.S. 905 (1973), *on remand* 35 Ohio St. 2d 215 (1973), the Ohio Supreme Court has approved the exhibition of an otherwise "obscene" film if portions depicting actual or purported acts of sexual intercourse are deleted. Such disregard of the mandate to view material "as a whole" in determining its dominant theme, *Miller v. California*, 413 U.S. 15 (1973) is indicative of the constitutionally infirm standards employed by the

Ohio courts in determining the obscenity *vel non* of the material.

Material whose subject matter is sex and which contains scenes of nudity is not obscene for those reasons alone. *Jenkins v. Georgia* ..... U.S. ....., 94 S. Ct. 2750, 2755 (1974); *Roth v. United States,* 354 U.S. 476, 487 (1957). The instant materials do not affront contemporary community standards, and taken as a whole, do not appeal to a prurient interest in sex. Thus, the materials are constitutionally protected expression, *Miller v. California, supra,* and this Court's independent review of the materials is compelled. *Jenkins v. Georgia,* ..... U.S. ....., 94 S. Ct. 2750 (1974).

V. APPELLANT WAS UNLAWFULLY CONVICTED WITHOUT PROOF OF GUILTY KNOWLEDGE AND GUILTY PURPOSE

Some degree of guilty knowledge and guilty purpose are essential to a valid prosecution for distribution of obscenity. *Smith v. California,* 361 U.S. 147 (1959).

At trial, the State presented little evidence to prove that the appellant had any knowledge, actual or constructive, of the character and content of the materials for which he was convicted, or had any illegal intent as to the use of such materials. The man behind the store's counter handed Simon the two books named in the indictment, stating that Simon should read them if Simon "was looking for something good." The remark is too ambiguous to support a finding of guilty knowledge or purpose. During the direct examination of Simon, the prosecutor asked, "The books you (Simon) looked at and the books which are before you which are substantially similar in content, are similar in content?" (Tr. 350) The ambiguity of the

prosecutor's statement rendered Simon's reply, "Yes, sir", meaningless.

VI. THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY IN DEFINING THE ELEMENTS OF THE CRIME

The trial court in charging the jury, identified the "average person in the community" to include "the community as a whole, *young* and old . . . men, women and children." Such instruction violated the First Amendment. *Butler v. Michigan*, 352 U.S. 380 (1957); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476, 489 (1957).

VII. THE ONE-ON-ONE PRE-TRIAL IDENTIFICATION OF APPELLANT VIOLATED DUE PROCESS OF LAW

Receipt into evidence of the in-court identification of the appellant by the police officer who identified appellant at a pre-trial confrontation was constitutional error. *First*, the officer identified the appellant in the absence of appellant's counsel, after the grand jury returned an indictment. *Kirby v. Illinois*, 406 U.S. 682 (1972); *United States ex rel. Robinson v. Zelker*, 368 F.2d 159 (2nd Cir. 1972), *cert. den.*, 413 U.S. 939. *Second*, the absence of any law enforcement emergency for conducting the pre-trial identification in the absence of a line-up and counsel, rendered the identification unnecessarily suggestive. *Neil v. Biggers*, 409 U.S. 188 (1972); *Smith v. Coiner*, 473 F.2d 877 (4th Cir. 1973), *cert. den.*, 94 S. Ct. 848. The failure of the State to prove that the in-court identification of the appellant was independent of the improper pre-trial identifica-

tion, rendered receipt in evidence of the in-court identification constitutional error. *United States v. Wade,* 388 U.S. 218 (1967).

CONCLUSION

This Court has exercised and continues to exercise its jurisdiction in cases involving state laws affecting First Amendment rights. *Jenkins v. Georgia,* ..... U.S. ....., 94 S. Ct. 2750 (1974) (probable jurisdiction noted at 94 S. Ct. 718); *Miller v. California,* 413 U.S. 15 (1973); *see also Roth v. United States,* 77 S. Ct. 854 (1957) (review on writ of *certiorari*). Thus, the Court has always regarded such cases as presenting substantial constitutional questions.

The constitutional validity of the Ohio obscenity law, Sections 2905.34 and 2905.35, is currently before this Court on a petition for writ of *certiorari, State ex rel. Sensenbrenner v. Adult Book Store,* 35 Ohio St. 2d 220 (1973), *petition for cert. filed,* 43 U.S.L.W. 3037, 3049 (U.S. Dec. 24, 1973) (No. 73-982).

In the instant appeal, appellant contends, *inter alia,* that the relevant Ohio statute is on its face, and as applied, constitutionally infirm in violation of the First and Fourteenth Amendments.

Not only does appellant challenge the validity of the determination of the Ohio Supreme Court that the Ohio obscenity law as construed comports with *Miller,* but appellant further challenges the ability of the Ohio Supreme Court to attempt a judicial rewriting of a definitive stat-

ute. The decisions of the highest courts of several states are in conflict as to whether state statutes can be judicially rescued by a substantial rewriting as undertaken by the Ohio Supreme Court. *State ex rel. Keating v. "Vixen"*, 35 Ohio St. 2d 215 (1973). *Cf.*, e.g., *State v. Shreveport News Agency, Inc.*, ... La. ....., 287 So. 2d 464, 14 Cr.L. 2273 (1973) (statute struck down); *Stroud v. State*, ... Ind. ....., 300 N.E.2d 100, 13 Cr.L. 2541 (1973) (statute struck down); *Commonwealth v. Horton*, ... Mass. ....., 15 Cr.L. 2184 (4-23-74) (statute struck down); *Rhodes v. State*, ... Fla. ....., 283 So. 2d 351, 14 Cr.L. 2081 (1973) (statute upheld); *Gibbs v. State*, ... Ark. ....., 14 Cr.L. 2450 (2-4-74) (statute upheld); *Art Theatre Guild, Inc. v. State*, ... Tenn. ....., 14 Cr.L. 2498 (2-19-74) (statute struck down); *State v. Welke*, ... Minn. ....., 14 Cr.L. 2498 (3-1-74) (statute upheld); *Chobot v. Circuit Court*, ... Wis. ....., 14 Cr.L. 2323 (12-10-73) (statute upheld); *State v. J-R Distributors, Inc.*, 14 Cr.L. 2006 (7-27-73) (statute upheld).

Appellant also urges that the instant state court decisions are violative of well-established constitutional principles in the areas of the law of search and seizure; proof of *scienter* as an element of the crime charged; determinations of obscenity *vel non* of specific materials; jury instructions in obscenity cases; and pre-trial procedures of identification of the accused.

The issues involved and herein presented are substantial and require plenary consideration for their resolution.

Respectfully submitted,

BERNARD A. BERKMAN
HAROLD L. LEVEY
Counsel for Appellant

APPENDIX A

Orders of the Supreme Court of Ohio

No. 74-219

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

MICHAEL KENSINGER,
Appellant.

ORDER ON APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY (May 10, 1974)

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

(Duly certified)

ORDER OF THE SUPREME COURT OF OHIO ON MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY (May 10, 1974)

(Caption as above)

It is ordered by the Court that this motion be overruled.

ORDER OF THE SUPREME COURT OF OHIO ON REHEARING (June 6, 1974)

(Caption as above)

It is ordered by the court that rehearing in this case is denied.

ORDER OF THE SUPREME COURT OF OHIO ON MOTION TO STAY EXECUTION (June 20, 1974)

(Caption as above)

Upon consideration of the motion, filed by counsel for Appellant, to stay execution pending the timely filing of an appeal to The Supreme Court of the United States, it is therefore

ORDERED that this motion be sustained and execution of judgment is hereby stayed for a period of twenty (20) days from this date to enable counsel for Appellant to apply to The Supreme Court of the United States for an indefinite stay.

/s/ C. WILLIAM O'NEIL
Chief Justice

APPENDIX B

Opinion of the Court of Appeals for Hamilton County, Ohio

(January 14, 1974)

No. C-73008

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

MICHAEL KENSINGER,
Defendant-Appellant.

DECISION

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries, and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of proceedings, the assignments of error, briefs and arguments of counsel.

Appellant presents by way of brief and supplement thereto, ten assignments of error alleged to have occurred in connection with or during the course of a jury trial resulting in the conviction of defendant-appellant under Section 2905.35, Ohio Revised Code, a misdemeanor section proscribing the production or dissemination of obscene material. These assignments of error will be considered below in the order raised by appellant.

I.

Appellant asserts a denial of rights under the First and Fourteenth Amendments of the Constitution of the United States, an unlawful arrest, and an unconstitutional prior restraint on protected materials, where there was no antecedent "judicially supervised adversary hearing" before the arrest and trial of appellant on the issue of the claimed obscenity of certain publications.

The publications in question, "Obscene! A New Definition For The Now-Generation" and "Perversions" were purchased by an officer of the Cincinnati Police Department, in plain clothes, in an adult bookstore on Seventh Street in downtown Cincinnati. The two publications were offered for sale to the officer by appellant, who was working behind the raised stand or counter inside the store, and who, after some conversation with the officer while the latter perused the publications on the rack, stated to the officer: "If you are looking for something good, look at these", handing him the two publications in question and breaking the plastic seal on them as he did so. The officer, after looking at the publications, tendered the purchase price to appellant, who accepted it. The officer then took his purchases out of the bookstore and, in due course, to the grand jury, which thereupon returned its indictment against "John Doe", subsequently identified as appellant.

This Court has had occasion previously to examine and to reject, under circumstances resembling the foregoing, the asserted necessity for an antecedent adversary hearing. *State v. Cornett*, 32 Ohio App. 2d 211. We find nothing in the law since the release of that opinion to require us to change our conclusion expressed there, that no constitutional, statutory, or other inhibition or prohibition exists to frustrate or taint the procedure followed

in this case. It may be noted that, like *Cornett,* supra, and unlike *Heller v. New York,* 93 S. Ct. 2789, *Roaden v. Kentucky,* 93 S. Ct. 2796, and other authorities cited by appellant, no Fourth Amendment involvement in search and seizure arises in this case. The material was offered to an officer lawfully on the premises as a business invitee, was accordingly purchased by him and thereafter removed by him with the consent of the owner's agent. Nothing was "seized" in a sense requiring a search warrant, or an adversary judicial determination to protect fragile First and Fourteenth Amendment rights. The reasons impelling a prior adversary hearing in cases involving the seizure for destruction or other such purpose of presumptively constitutionally protected materials, as summarized in the *Heller* and *Roaden* cases, are simply not, in our view, present here. Accordingly, appellant's first assignment of error is overruled.

II.

Appellant's second assignment of error asserts error in the admission of the two publications into evidence without contemporaneous testimony and evidence bearing on the issue of the obscenity of the publications. Thus, argues appellant, the State may not rely solely upon the publications themselves to demonstrate their own obscenity, but must accompany such exhibits with independent testimony relating such publications to the specific obscenity tests or standards then applicable.

We do not so understand the law. As stated in the majority opinion in *Paris Adult Theater I v. Slaton,* 93 S. Ct. 2628:

> "Nor was it error to fail to produce 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed

in evidence . . . the films, obviously, are the best evidence of what they represent. In the cases in which this court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the questions."

Appellant's second assignment of error is without merit.

III.

Next, appellant asserts that the statutes under which appellant was indicted, tried and convicted, Revised Code Sections 2905.34 and 2905.35, construed in pari materia, are facially unconstitutional and have been applied in an unconstitutional manner, in contravention of the First and Fourteenth Amendments. However, in *State, ex rel. Keating v. Film Entitled "Vixen"*, 27 Ohio St. 2d 278, the Supreme Court of Ohio considered the issue of these two enactments against the requirements of the First Amendment of the U. S. Constitution and the Ohio Constitution and found no conflict therein either "facially", nor as they were involved in that case, in a nuisance abatement action under Revised Code Section 3767.01 et seq. The court stated:

"Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse." (p. 283)

* * * * *

"Those two sections, now the law of Ohio, when construed together and applied to the instant facts, effectively provide that . . . So stated, they proscribe conduct which 'bears no necessary relationship to the freedom to speak, write, print, or distribute informa-

tion or opinion.' *Schneider v. State* (1939), 308 U. S. 147, 161."

In the body of the *Vixen* decision, the court cited both *Roth v. United States*, 354 U. S. 476, and *Memoirs v. Massachusetts*, 383 U. S. 413 which, as pointed out in the dissent of Judge Corrigan, supplied the definition of obscenity required by the Supreme Court of the United States to be applied in the trial of that, as in this case. We can find no reason or authority to require us to find Revised Code Sections 2905.34 and 2905.35 facially unconstitutional. *State v. Mazes*, 7 Ohio St. 2d 136; *State v. Blair*, 32 Ohio St. 2d 237.

Nor do we find them unconstitutionally applied under the record of this case; certainly not, as appellant argues, because they "impose a standard equally applicable to juvenile and adults alike, thereby reducing the adult standard to that of a juvenile standard", since, from the statutory scheme, it may as readily be argued that the juvenile standard is *raised* to that of the adult standard. In any event, the State has been held to have a legitimate concern in both areas, and we find no reason why such concern may not be expressed in the fashion adopted by the legislature here. *Paris Adult Theater I v. Slaton*, 93 S. Ct. 2628 (slip opinion at pp. 7-8).

As to appellant's argument, raised in his Supplementary Brief, that the recent decision by the Supreme Court of the United States in *Miller v. California*, 93 S. Ct. 2607, so repudiated the former *Roth-Memoirs* obscenity test as "unworkable" and as casting a burden on the State "virtually impossible to discharge", that any conviction secured thereunder is necessarily infirm, we must disagree. We have been cited to no authority and have discovered none which would prohibit a State from enacting or re-

quiring a more *stringent* or difficult-to-prove test for obscenity than that currently deemed permissible under the First and Fourteenth Amendments. If *Miller* has now eased two of the *Memoirs* tests so that the State is no longer required to establish that the materials are "utterly without redeeming social value", but may instead show that the material "taken as a whole, does not have serious literary, artistic, political, or scientific value", and if the State is no longer required to offer evidence of nor the trial court to charge on "national standards", but where obscenity may be determined by applying "contemporary community standards" instead, we are aware of no prejudice to a defendant found guilty by a jury, under competent and probative evidence to sustain it, pursuant to a charge by the trial court requiring it to find the materials to be *utterly* without redeeming social value viewed in the context of national standards. Not, in any event, unless we are required to find that *Miller* declared the old test to be *absolutely* impossible to apply and, therefore, all convictions secured thereunder to be suspect and perhaps voidable. We find nothing in *Miller* to require this drastic view.

We may note, in passing, the remand of the above *Vixen* decision which was decided under the *Roth-Memoirs* rule, by the Supreme Court of the United States to the Supreme Court of Ohio, for consideration in the light of *Miller,* and the reaffirmance thereof by the latter, stating:

> "This court is of the opinion that the statutes applied in this cause initially by the court comport with the standards enunciated in *Miller.*"

State ex rel. Keating v. "Vixen", 35 Ohio St. 2d 215. We find, therefore, as did apparently the Supreme Court of

Ohio, no fatal conflict in a conviction secured under criminal statutes limited and applied to conform to the *Roth-Memoirs* test, where such statutes are also held subsequently to comport with the broader *Miller* test.

As to appellant's argument that the *Miller* test may not be retroactively applied to sustain the instant judgment, we defer discussion to our disposition of appellant's tenth assignment of error.

Appellant's third assignment of error is not well taken and is accordingly overruled.

IV.

In his fourth assignment of error, appellant argues that the absence from the record of any evidence on behalf of the State of "pandering", of distribution of materials to juvenile, and/or evidence or proof of any mode of distribution of materials in a manner that an unwilling adult could not avoid exposure, resulted in a failure to remove the materials from the protection of the First and Fourteenth Amendments, requiring favorable action by the trial court on various motions to strike and to dismiss appellant. This argument appears to derive from *Redrup v. New York,* 386 U. S. 773, when the court reversed several obscenity convictions from various states, pointing out in its terse opinion that none of the cases considered involved areas of control which the Supreme Court had previously held to be legitimate areas of state concern, for example, a specific and limited statutory concern for juveniles, assaults upon an individual's right of privacy by obtrusive display of offensive materials, and "pandering" in the *Ginzburg* sense. We do not read *Redrup,* however, as any indication of intent to *limit* a State's legitimate concern to the three specific areas mentioned, and to preclude all others. And, indeed, this appears to

be clearly confirmed in *Paris Adult Theater I v. Slaton*, supra, where the court rejected the argument that the films in question acquired constitutional immunity where they were exhibited solely to consenting adults, with no evidence of pandering or invasion of privacy of the non-consenting public generally. Said the court:

> ". . . this Court has never declared these to be the only legitimate state interests permitting regulations of obscene material."

Appellant's fourth assignment of error is accordingly overruled.

V.

Next, appellant argues that the trial court erred in failing to grant appellant's motion to dismiss at the conclusion of the State's case for failure to establish a prima facie case. To the extent that appellant's argument under this assignment is directed toward the alleged necessity for the introduction by the State of evidence of distribution to juveniles, invasion of privacy, or pandering, the assignment is answered by our disposition of assignment of error numbered four above. The balance of this prolix assignment of error and argument thereunder is addressed to the alleged failure of the State to adduce evidence sufficient to constitute a prima facie case, of the three elements required by the *Roth-Memoirs* cases for the proscription of obscenity, and of their coalescence therein. Since we understand the law to be that the publications are themselves the best evidence of their own character, and, where placed before the triers of the facts under proper instructions, do not require expert or other commentary or formal gloss, or testimony relating them to national contemporary community standards, we find

the balance of this assignment of error to be without merit. *Paris Adult Theater I v. Slaton,* 93 S. Ct. 2628 (slip opinion at pp. 6-7, esp. footnote 6 on p. 7).

VI.

The appellant's sixth assignment of error argues that the trial court erred in not dismissing the case at the end of appellant's case, where the State offered no evidence in chief, nor rebuttal evidence, as to the presence of the three elements required under *Roth-Memoirs* decisions, and of their coalescence therein. Since, as previously noted, the publications were themselves placed in evidence and were before the jury to consider, for the reasons noted in our disposition of assignment of error numbered five above, we find no error in the failure of the trial court to dismiss this cause at the conclusion of appellant's case. Accordingly, appellant's sixth assignment of error is overruled.

VII.

Appellant's seventh assignment of error addresses itself to alleged error in the trial court's charge to the jury, namely, in refusing to give certain charges specifically requested, in erroneously charging on national community standards, on the elements of obscenity and scienter, and in refusing to respond properly to a question posed by the jury. A careful reading of the charge by the trial court convinces us that the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio statute, and generally in its responsibilities and duties as triers of the facts. Those charges specially requested by appellant and refused by the trial court were denied as either subsumed in the

general charge and therefore redundant, or as otherwise improper or misleading. We find no error prejudicial to appellant in their refusal, nor in the response by the trial court to the query of the jury. As to appellant's argument, contained in his Supplemental Brief, that the *Miller* decision fatally weakens any conviction not under the *Roth-Memoirs* test, we refer to our examination of this issue in appellant's third assignment of error.

Appellant's seventh assignment of error is overruled.

VIII.

Next, appellant argues that the "systematic exclusion" of young jurors from service on juries dealing with obscenity cases violated appellant's right to an impartial jury under the Sixth and Fourteenth Amendments of the Constitution of the United States. The record reveals that the customary procedure was followed in this case, of using a 1970 poll book to draw at random a venire of potential jurors. No suggestion is made, and none is present in the record, that any legal or constitutional irregularity exists with respect to venire so selected or to the method of selecting it, *except* to the extent that it necessarily excluded those under twenty-one years of age (twenty-three years at the time of trial in 1972) not then eligible to vote and therefore not included in the 1970 poll books. We find this procedure totally unlike the purposeful and systematic exclusion of racial groups held improper in *Swain v. Alabama*, 380 U. S. 202, and have been directed to no authority which would require us to hold otherwise. Indeed, the argument advanced by appellant invites a reductio ad absurdum rejoinder: if we must constitutionally include eighteen year olds to make up an impartial jury, why not sixteen year olds, who, after all, are permitted, under certain circumstances, to marry; or fourteen year

olds who have achieved (or suffered) puberty; and if registered voters are included, why not citizens not so registered, including those imprisoned for crimes? It is obvious to us that some technically feasible method for selecting potential jurors reasonably calculated to secure and which does in fact secure a random unpremeditated sampling of citizens will, together with other protective procedures such as voir dire examination, peremptory challenges and challenges for cause, and the presence of an impartial magistrate instructing the jury on matters of law and procedure, satisfy the requirements of the Sixth and Fourteenth Amendments for an impartial jury, without the necessity of finding twelve persons precisely proportioned in age, sex, race, socio-economic status, religion, etc. to their larger counterparts in society. Appellant's eighth assignment of error is without merit.

IX.

Appellant's ninth assignment of error asserts that the verdict is against the manifest weight of the evidence and is contrary to law. We have examined the record, including the publications in question, and have concluded that there is present in the record substantial credible evidence of probative value as to each element of the offense charged. Appellant's ninth assignment of error is accordingly overruled.

X.

Finally, appellant asserts by way of his tenth assignment of error, that the constitutional test formulated by the Supreme Court of the United States, incorporated into and applied by the State in the prosecution of this case (that is, *Memoirs v. Massachusetts*, 383 U. S. 413), was "completely and totally repudiated" by the Supreme Court

in *Miller v. California*, 93 S. Ct. 2607, and that the retroactive application of the *Miller* test to sustain the instant judgment would offend the Fourteenth Amendment of the Constitution of the United States.

The point is not contested by the appellee, the State arguing that the retroactive application of *Miller* is not sought by the appellee and that the judgment against appellant should and can be sustained on the basis of existing law at the time of the convictions. This position impliedly argues that *Miller* did not so "completely and totally repudiate" the previous obscenity test *that any conviction secured thereunder* is necessarily infirm. We agree, for the reasons in our disposition of appellant's third assignment of error. Accordingly, we overrule appellant's tenth assignment of error.

It is, therefore, the order of this Court, that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

HESS, *P. J.*, SHANNON and PALMER, *J. J.*

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B (Cont'd)

Opinion of Court of Appeals in Companion Case

(January 14, 1974)

No. C-72345

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

QUEEN CITY NEWS, INC.

and

JOHN MARSHALL,
Defendants-Appellants.

DECISION

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries, and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the assignments of error, the briefs and arguments of counsel.

Appellant, Queen City News, Inc., presents by way of brief and supplement thereto, thirteen assignments of error alleged to have occurred in connection with or during the course of a jury trial resulting in the conviction of appellant, Queen City News, Inc., and a jointly tried co-defendant, John Marshall, under Section 2905.35, Ohio

Revised Code, a misdemeanor section proscribing the production or dissemination of obscene material.

Appellant, John Marshall, presents by way of brief and supplement thereto, sixteen assignments of error.

These assignments of error will be considered below first in the order raised by appellant, Queen City News, Inc., and second in the order raised by appellant, John Marshall.

We note that this Court this day has decided State of Ohio v. Michael Kensinger, case number C-73008, unreported, wherein many of the issues raised are similar to those broached by the assignments of error in the instant case. Additionally, we note that counsel for Michael Kensinger, defendant-appellant, in case number C-73008, is the same counsel representing appellant, John Marshall, herein, and the counsel for appellant, Queen City News, Inc. is his associate.

Therefore, in disposing of some of the assignments of error asserted by the appellants in this case, reference will be made to our rulings in Kensinger, infra, where the reasons therefor apply to the assignments here before us.

Assignments of Error, Queen City News, Inc.:

I.

Queen City asserts that the statute upon which the indictment was based violates the First and Fourteenth Amendments to the United States Constitution.

This assignment is not well taken for the reasons set forth in our rulings upon the third and fourth assignments of error in Kensinger, supra.

II.

This assignment overlaps the first in that the contention is that the indictment failed to charge an offense punishable within the permissible limits of the First and Fourteenth Amendments to the United States Constitution. We find it not to be well taken for the reasons set forth in the disposition of the fourth assignment of error in Kensinger, supra.

III.

Appellant alleges that the trial court erred in overruling the pretrial motion to suppress evidence obtained in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution.

It is argued first in support of this assignment that special First Amendment principles apply which require a prior adversary hearing before seizure.

Despite the fact that some 1400 separate items, including books, magazines, film, phonograph records and rubber goods were seized and removed from a warehouse, there is nothing to show that more than one copy of a book, magazine or other item was taken by the police officers conducting the search. There is testimony that the warehouse contained from 100,000 to 200,000 items, there being numerous copies of each publication and duplications of the rubber goods. It is undisputed that the business of appellant was not shut down nor interrupted for more than several hours.

In deciding *State v. Albini* (1972), 31 Ohio St. 2d 27, the court remarked at page 30 of the opinion:

". . . we do not read the above cited Supreme Court decisions as demanding that in every case where a

seizure of alleged obscene material is to be made, a preseizure adversary hearing is constitutionally required. Whether or not such a hearing is necessary must depend upon the nature and purpose of the seizure."

Just as in *Albini*, supra, the seizures now before us were not made for the purpose of preventing the dissemination of that which the various books, magazines, films and phonograph records contained nor preventing the sale of the rubber goods. Rather, the single samples were taken for the purpose of preserving them in order that they might be used as evidence in proceedings to determine whether their exhibitors were guilty of committing a crime.

Subsequent to the decision in *Albini*, the Supreme Court of the United States decided *Heller v. New York*, 93 S. Ct. 2789 (1973), the first headnote of which is:

"There is no absolute First or Fourteenth Amendment right to a prior adversary hearing where allegedly obscene material is seized pursuant to warrant to preserve material as evidence in a criminal prosecution."

This squares with the syllabus in *Albini*:

"Where, incident to a lawful arrest upon a charge of exhibiting an obscene motion picture film, a single copy of the film is seized as evidenced to be used in support of the charge, the fact that, prior to its seizure, no adversary hearing had been held upon the question of the obscenity of the film does not require reversal of a conviction for its unlawful exhibition."

Consequently, as we noted in our ruling on the first assignment of error in Kensinger, the reasons impelling a prior adversary hearing in cases involving the seizure of

presumptively constitutionally protected materials for destruction or other such purpose, as summarized in *Heller,* supra, *Roaden v. Kentucky,* 93 S. Ct. 2796, are simply not present in this case.

Appellant argues, further, that probable cause did not exist for the issuance of the search warrant; that the informant's reliability was not supported; that the facts failed to establish that a crime was being committed at the time the warrant issued, that the warrant failed to meet Fourth Amendment specificity requirements and failed to satisfy First and Fourth Amendment particularity requirements, and that the search conducted by the executing officers was a general search.

Fundamentally, it is required that the officer authorizing the search of premises be neutral and detached and that the information given him by an affiant be sufficient to enable him to make an independent judgment that probable cause exists to issue the warrant. *State v. Haynes,* (1971), 25 Ohio St. 2d 264.

The standard of reasonableness for obtaining a search warrant has been set forth in *Aguilar v. Texas,* 378 U. S. 108, and *Spinelli v. United States,* 393 U. S. 410. Where the search warrant is issued pursuant to an informer's tip, the affidavit must: (i) set forth such of the underlying circumstances as may be necessary to enable the magistrate to judge the probable validity of the informant's conclusions; and (ii) some indication of the trustworthiness of the informant.

Here, the informant was a former employee of Queen City News, Inc. who knew what materials were stored in the warehouse and who had delivered such as a route man serving customers. We believe that the "two pronged" test was met and that the affidavit is sufficiently detailed

as to meet the requirements of law. Our examination of the record leads us to conclude that the tipster's information was not stale. The affiant had observed appellant conducting business, had received information about the character of that business and had verified by personal observation that at least one visible item was a publication which, in his opinion, was obscene. Such facts, coupled with the background afforded by the informant, clearly negate appellant's protests that there was nothing before the magistrate to establish probable cause that any crime was being committed.

It is equally apparent that where, as here, only single samples of a large inventory of many types of publications and other goods are seized to be used as evidence in a proceeding to follow and where, as here, such items have been identified with sufficient specificity and particularity in the warrant to search, such search is lawful and is not a general search.

Accordingly, we find the third assignment of error not to be well taken.

IV.

In this assignment, appellant asserts that the materials upon which the indictment was based were "protected expression under the First and Fourteenth Amendments to the United States Constitution" and that the prosecution totally failed to meet its burden of proof of obscenity.

It can no longer be gainsaid that obscene material is not speech entitled to First Amendment protection. *Paris Adult Theater I v. Slaton*, 93 S. Ct. 2628; *Miller v. California*, 93 S. Ct. 2607; *United States v. Roth*, 354 U. S. 476.

In deciding *Slaton*, the court pointed out at pages six and seven of the opinion:

"Nor was it error to fail to produce 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence . . . the films, obviously, are the best evidence of what they represent. In the cases in which this court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."

Then, the record before us when viewed in the light of what we understand the law to be, clearly demonstrates that this assignment of error is without merit. See, also, the rulings upon the second and fifth assignments of error in Kensinger, supra.

V.

This assignment is that the trial court erred in overruling the motion for acquittal upon the ground that the prosecution had failed to prove all of the essential elements of the offense charged.

The thrust of the argument advanced by appellant echoes that given in support of the fourth assignment.

We have examined the record, including the publications and materials in question, and are compelled to conclude that there is therein substantial credible evidence of probative value as to each element of the offense charged. Therefore, and for the reasons given above in our ruling on the fourth assignment, the fifth assignment is not well taken.

VI.

The sixth assignment reasserts the contention that the materials received into evidence are constitutionally protected. It is without merit for the reasons given in rul-

ings upon the fourth assignment herein, and in our rulings upon the fifth and sixth assignments of error in Kensinger.

VII.

This assignment is that the trial court erred in overruling appellant's objections to admission into evidence of subpoenaed documents. It is urged that the subpoena *duces tecum* of corporate records consisting of personnel and payroll records and delivery sheets was (a) illegally issued; (b) invalidly served, and (c) that the records were erroneously received into evidence.

The State first attempted to serve an alleged statutory agent, but the agency was denied by the purported agent. Then, the State dropped a subpoena through the mail slot of the warehouse premises. Lastly, the State served an employee of the corporation on the loading dock of the warehouse.

Upon instruction of the court after conference with counsel, counsel for Queen City brought the records into court, but protested their production.

Although a number of cases are cited in support of branch (a) of the argument, with none of which do we disagree, we are not persuaded that corporation records cannot be subpoenaed in a criminal case. It must be remembered that the records were not seized but were sought to be produced by valid process.

Secondly, service upon the employee, under all the circumstances disclosed by the record, was sufficient.

The contention that the documents were erroneously received raises the essential question of protection afforded the corporate and individual defendants in the case by the Fifth Amendment to the Constitution of the United States.

In *Wilson v. United States*, 221 U. S. 361, it was observed:

> ". . . [the corporation] cannot resist production [of books and papers] upon the grounds of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment . . . , it must submit its books and papers to duly constituted authority when demand is suitably made."

The Ohio Supreme Court adopted this view and quoted extensively from *Wilson*, supra, in deciding *In re Bott*, 146 Ohio St. 511 . At page 518 of the unanimous opinion in that case, we find:

> ". . . an officer of a corporation cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it."

This concept has been refreshed in *State v. Pussycat Cinex* (1973), 36 Ohio St. 2d 108, which cites *Wilson*, supra.

The privilege against self-incrimination is, then, not available to a corporation. Therefore, the seventh assignment of error is not well taken. Parenthetically, we note that this question as it pertains to the individual defendant-appellant will be discussed below.

VIII.

This assignment relates to the charge to the jury, the contention being that it violated the First and Fourteenth Amendments to the United States Constitution. Essentially, the arguments in support of this assignment parellel those advanced with reference to the seventh assign-

ment of error in Kensinger. We find this assignment not to be well taken for the reasons given in our rulings upon the third and seventh assignments of error in Kensinger. Here, as in Kensinger, the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio Revised Code, and otherwise in its general duties and prerogatives.

IX.

Here, appellant claims that the court erred in limiting voire dire examination of the jury by defense counsel.

It is argued that rights accruing under the Fourteenth Amendment were denied because the court limited efforts of counsel to "probe the attitudes of prospective jurors" regarding, inter alia, "contemporary community standards of depiction of sexual material", "shifting views of frankness" and morality in depiction of sexual subject matter, "depth of feelings regarding obscenity of depiction", and attitudes about determining the dominant theme and redeeming social value of "sexually oriented" publications.

Examination of the jury upon voir dire begins at page 196 of the transcript of the proceedings and concludes at page 610. The initial impression we received upon our examination of this part of the record is that the judge presiding exhibited patience, restraint and stamina. He permitted wide latitude to both defendants before the bar in their searching examination of prospective jurors. We find nothing to sustain their claim that the court abused its discretion or that strictures placed upon interrogation of the panel in ruling upon objections by the State prejudiced the accused.

The ninth assignment is not supported by the record and is not well taken.

X.

The tenth assignment is that the trial court erroneously denied defense counsel inspection of grand jury minutes.

The Supreme Court of Ohio recited the general rule to be applied when inspection of grand jury minutes is sought in its decision in *State v. Laskey*, 21 Ohio St. 2d 187, at page 191 of the per curiam opinion:

> "Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general."

The court referred in *Laskey* to the rule in *State v. White* (1968), 15 Ohio St. 2d 146, declaring that:

> "The *White* rule contemplates a limited investigation for the purpose of determining whether inconsistencies exist between a witness' prior statements and his testimony at trial. Such investigation can be made only after the witness testified at trial, and, generally, cannot be used by an accused for ascertaining the evidence of the prosecution for the purpose of trial preparation. It is a discovery device only for the purposes of impeachment upon cross-examination."

See, also, *State v. Patterson* (1971), 28 Ohio St. 2d 181, especially syllabus three.

In this case, appellant sought inspection of the minutes to "test the foundation upon which the indictment was grounded", arguing that "there is no unequivocal evidence in the record indicating that the grand jury returned the . . . indictment . . . upon a review of the 41 respective items supportive of the counts therein contained".

Who do not discern from the record that the appellant has demonstrated the particularized needs required by the rule in *White* and *Laskey* and, consequently, are constrained to conclude that the assignment of error is not well taken.

Supplemental Assignments of Error.

XI.

Queen City urges herein that the affirmance of the conviction would violate due process and ex post facto prohibitions.

This assignment reflects the issues broached in the third and tenth assignments of error in Kensinger and is found not to be well taken for the reasons given therein.

XII.

Here, appellant claims again that the statutes under which it was charged are void for overbreadth or vagueness. It is not well taken for the reasons set forth in our ruling upon the first assignment of error herein and in the third and fourth assignments in Kensinger.

XIII.

The thirteenth assignment restates the issues raised by the third and fourth assignments of error herein and is not well taken for the reasons given therein.

Therefore, the judgment of the Court of Common Pleas of Hamilton County, Ohio, as it pertains to appellant, Queen City News, Inc. is affirmed.

Assignments of Error, John Marshall:

I.

In his first assignment of error, appellant, John Marshall, asserts that the search and seizure at the warehouse of Queen City News, Inc. was an unreasonable search and seizure.

While this assignment is prolix, we find that it raises the same, or very similar, issues brought before us in the third assignment of error in the appeal of Queen City News, Inc. Hence, we find this assignment of error by appellant, John Marshall, not to be well taken for the reasons given in our ruling hereinbefore on the third assignment of error of Queen City.

II.

This assignment is that the court erred in admitting publications into evidence where no evidence was presented establishing obscenity of the items.

The same question has been considered and ruled upon in Queen City's appeal with respect to the fourth and sixth assignments therein and in the appeal of Michael Kensinger with respect to the second and fifth assignments of error in that case.

Accordingly, this assignment is found to be without merit for the same reasons.

III.

The appellant asserts, here, that Sections 2905.34 and 2905.35, Ohio Revised Code, are unconstitutional and repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

The same issue was raised by Queen City and Kensinger and this assignment by Marshall is held to be with-

out merit for the reasons given in our rulings on the first assignment of Queen City and the third and fourth assignments of error by Kensinger.

IV.

Here, appellant questions whether the proof by the State demonstrated that the publications were not protected against State regulation by the First and Fourteenth Amendments.

We have ruled on the same proposition in the first and second assignments of error by Queen City herein and in the third and fourth assignments in Kensinger. Therefore, the assignment of error by Marshall is not well taken for the same reasons.

V.

This assignment alleges that the prosecution failed to establish a prima facie case. It is not well taken for the reasons given above on the fourth and sixth assignments of Queen City and the second and fifth assignments in Kensinger.

VI.

Here, appellant urges that the court erred in not dismissing the cause at the conclusion of defendant's case, where the State offered no rebuttal evidence.

It is not well taken for the reasons given by us in disposing of the fifth and sixth assignments in Kensinger and the fourth and sixth assignments of Queen City herein.

VII.

The seventh assignment of error is identical in its essential thrust to the seventh assignment of error by Queen

City as it relates to the admission of the corporate records of Queen City News, Inc.

A similar assignment numbered seven has been made by Queen City and ruled upon above as it pertains to that appellant, and to the degree that our rulings therein apply to Marshall, individually they are adopted here.

When the entire transcript of the proceedings is considered, it is clear that it was never disputed that appellant, John Marshall, was connected with the operation of the business of Queen City News, Inc. He was at the warehouse when the warrant to search was executed and the seizure effected and had been there the day before. The essence of the defense was not that the accused did not possess the materials but they were not obscene and therefore protected.

We view the admission of the corporate records as being cumulative, at most, and are able to discern no ground upon which to determine that the appellant, Marshall, was prejudiced thereby, either by the records having been received in evidence or by the possibly contradictory remarks of the court to counsel. Hence, the assignment of error is without merit.

VIII.

This assignment challenges the instruction to the jury on the "national contemporary community standard", and appellant contends, inter alia, that the jury was misdirected on the issues of "dominant theme-prurient appeal" and "redeeming social value".

We find the eighth assignment of error not to be well taken for the reason that the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases. For an

expansion of this fundamental reason, attention is directed to our rulings in the seventh and third assignments in Kensinger and the eighth assignment in the appeal of Queen City.

IX.

This assignment asserts that the record establishes the bias of the trial court which denied defendant's right to effective counsel and to a fair and impartial trial.

We find the assignment not to be well taken because the record, considered in its totality, fails to support the assigned error in any of its particulars.

X.

The tenth assignment by Marshall is the same in its thrust and import as the tenth assignment by Queen City based upon denial of access to grand jury minutes and is without merit for the reasons given in our ruling in Queen City's appeal.

XI.

This assignment asserts that the court prejudiced Marshall in restricting inquiry to the venire. It is without merit for the reasons given in our rulings upon the ninth assignment in the appeal by Queen City.

XII.

Here, appellant contends that the court violated his rights granted by the Fifth and Fourteenth Amendments to the Constitution of the United States by "commenting on the failure of the defendant to testify in his own behalf" during its instruction to the jury.

The court stated to the jury:

> "It is not necessary that a defendant take the witness stand in his or its own defense. He has a constitutional right not to testify. The fact that the defendant or defendants did not testify must not be considered for any purpose nor should any inference be drawn therefrom."

We believe the better practice to be for the court not to so instruct, but when the charge as a whole is considered the inclusion of the quoted language does not constitute prejudicial error.

Therefore, the assignment is not well taken.

XIII.

This assignment is, essentially, that Marshall was denied constitutional rights because the publications were not read to the jury and that since the jury "deliberated for a total of four hours and forty-six minutes" it follows necessarily that the jury could not have read and considered the materials submitted as evidence.

There is nothing in the record from which we could conclude that the jury was guilty of misconduct without indulging in improper speculation. There is nothing to demonstrate how the jury reached the verdict and it must be presumed that the result was reached in harmony with the instructions of the court and according to law. The general rule to be applied is that no judgments of conviction will be reversed unless it appears affirmatively from the record that the accused was prejudiced. We find no such affirmative demonstration and must conclude that the assignment is not well taken.

XIV.

The ground of this assignment of error has been disposed of in our ruling on the eighth assignment of error in Kensinger and the reasons there given are adopted here.

XV.

Here, Marshall asserts that the verdict is manifestly against the weight of the evidence and contrary to law.

We have examined the record, including the publications and materials in question, and have concluded that there is present in the record substantial evidence of probative value as to each element of the crime charged. Accordingly, the assignment is not well taken.

XVI. (Supplemental)

This assignment of error is that the constitutional test (*Memoirs*) has been "completely and totally repudiated" in *Miller v. California*, 93 S. Ct. 2607. It is not well taken for the reasons given in the disposition of the third and tenth assignments in Kensinger and adopted in the eleventh assignment in the appeal of Queen City.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, as it pertains to appellant, John Marshall, is affirmed.

HESS, *P. J.*, SHANNON and PALMER, *J. J.*

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

Court of Appeals No. 73-008
Ohio Supreme Court No. 74-219

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

-vs-

MICHAEL KENSINGER,
Defendant-Appellant.

NOTICE OF APPEAL

Notice is hereby given pursuant to Rule 10, United States Supreme Court Rules that Michael Kensinger, defendant-appellant, hereby appeals to the Supreme Court of the United States from the denial of the Supreme Court of Ohio of appellant's leave to appeal entered in this action May 10, 1974, and its denial of a motion for reconsideration June 6, 1974.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ BERNARD A. BERKMAN
HAROLD L. LEVEY
BERKMAN, GORDON & KANCELBAUM
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
781-5245
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the within Notice of Appeal was served upon Simon L. Leis, Hamilton County Prosecutor, 420 Hamilton County Court House, Cincinnati, Ohio 45202, counsel of record for appellee, by depositing same in a U.S. Post Office mail box, so addressed, with first class postage prepaid, this 21st day of August, 1974.

A copy of the within Notice of Appeal was mailed to the Clerk, Supreme Court of Ohio, Columbus, Ohio, this 21st day of August, 1974. All parties required to be served have been served.

/s/ BERNARD A. BERKMAN
Counsel for Appellant

APPENDIX D

Relevant Sections of the Ohio Revised Code

[Former] § 2905.34 Definitions:

As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

[Former] § 2905.35 [Production or dissemination of obscene material or performances.]

No person, with knowledge of the content and character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years, or both.

[Current] § 2907.01 Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

[Current] § 2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A) (2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was dis-

seminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.